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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 168

FREDERICK C. OVERBURY,

Petitioner,

vs.

JOHN W. PLATTEN AND KINTZING P. EMMONS, INDIVIDUALLY AND AS EXECUTORS AND TRUSTEES OF AND UNDER THE WILL OF CHARLES L. DENISON, DECEASED.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF.

EDWARD V. CONWELL,
Counsel for Petitioner.

FRANK W. JACKSON,
Of Counsel.

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Opening Statement.

Because of matters dealt with in respondents' brief, it is necessary in this reply to go somewhat outside the scope of argument customary on applications of this kind.

Respondents' Version of the Facts.

Respondents say in their brief (p. 1) that the material facts in this case are clearly set forth in the opinion of the Circuit Court. Obviously through inadvertence, the opinion of that learned court is inaccurate in certain respects. For instance, at page 116 of the record there is omitted from the

opinion the statement that Overbury's tender was under compulsion by respondents' notice of their readiness and their unconditional demand for the performance of the contract by him (R. 74, 75). The materiality of this omission is shown in petitioner's Question No. IA (Pet. p. 4). Respondents have made no attempt to answer this question except to say it is inconsequential (answering brief, pp. 3, 4). Again the court said, top of page 117: "Overbury says, and *arguendo* we shall assume it to be true, that this assignment was only as trustee for the defendants in order that Farley, who lived in New York, might be better able to attach the Flintkote shares". There is no such assertion by Overbury in the record. If there had been, respondents would have referred to it in their brief, instead of relying upon the court's evident error in attributing it to Overbury. As a fact, Overbury said respondents used Farley as a dummy (R. 25, f. 73) and the learned trial judge held he was practically a dummy (R. 59, f. 175). The materiality of giving the real status of Farley is brought out in the minority opinion of the Appellate Division, in which it was said: "The foreign representatives (meaning respondents) who assigned to plaintiff (Farley) in this State for the purpose of bringing this action (in Kings County) did so in violation of their duties as fiduciaries, and the defendant (Overbury) in paying the alleged assignee, would not be protected against a future claim by the assignors". (New York Law Journal, July 2, 1940, p. 11).

Without further analysis, it is sufficient to say that all the material facts in this case have been set out in the petition with appropriate references to the record.

Additional Facts.

The reargument of the appeal in the Kings County action, mentioned at page 5 of the petition herein, resulted in the affirmance of the judgment in favor of Farley by a divided

court. Two of the justices dissented and voted to reverse the judgment and to dismiss the complaint (New York Law Journal, July 2, 1940, *supra*). This gave the defendant, petitioner here, the right to appeal to the New York Court of Appeals, and such appeal has been taken.

Respondents' Citations.

At page 2 of respondents' brief appears an excerpt from 65 C.J. 59 to the effect that it is a good defense to an action in conversion that the property was seized under an attachment against the owner of the property, or that at the time of the demand the fund in question was under order of court in garnishment proceedings. The latter phrase has no application here. In none of the cases cited in C.J. to support the excerpt did it appear that the person seeking to justify his refusal to surrender the property had himself procured or been instrumental in procuring the issue and levy of the attachment, as is the fact in this case (petition herein, top p. 3).

A defendant's participation in or responsibility for the levy of an attachment deprives him of its protection as a defense to an action for conversion of the property (*United States* v. *Peck*, 102 U. S. 64; followed in *Imperator Realty Co.* v. *Tull*, 228 N. Y. 447, 457; *United States* v. *Stephens*, 1 Fed. Supp. 33, 34, and cases there cited.)

Concerning the rule taken from 65 C.J. 69, respondents say in their brief here (bottom p. 2): "A leading New York case applying this principle is *Warner* v. *Jaffray*, 96 N. Y. 248." In that case one Weld made an assignment in New York of property which he owned in Pennsylvania. Under the law of the latter State, an assignment was not valid until it had been recorded and creditors had received notice of it. Before the assignment had been recorded and noticed to creditors the plaintiffs, also residents of New York, levied an attachment on the property in Pennsyl-

vania. The only holdings in the case were (p. 255) that under Pennsylvania law the attachment took precedence over the assignment, and (p. 258) that the plaintiffs stood on a parity with creditors in Pennsylvania in respect of enforcing their claim in the courts of that State.

Respondents' Version of Question IA.

Respondents have undertaken to restate petitioner's first question according to a formula of their own (respondents' brief, p. 4). The proposition as stated by them is fallacious. No lien or claim attached to the collateral between the notice of readiness and the time fixed therein for unconditional performance (R. 74, 75).

As to Question IB.

Respondents' argument on pages 5 and 6 of their brief is beside the point raised in the above question, which is concerned both with their refusal to deliver the pledged collateral when Overbury made tender, and with their sale of the collateral after the tender. Respondents could justify such sale only if petitioner's tender was not good. That it was good is not questioned, and the trial court held it was good (R. 54, fols. 128, 129). The New York Court of Appeals (*Halpin* v. *Phoenix Ins. Co.*, 118 N. Y. 165, 177) laid down the applicable rule in the following language:

> "A debtor who has transferred securities as collateral to the debt, has a legal right upon payment of the debt, to have such collaterals reassigned to him, and a tender of the debt is not destroyed by making a condition of its acceptance that the creditor transfer the collaterals to him, because that condition is one the debtor has the right to insist upon and the creditor has no right to refuse."

Neither respondents nor Farley (their purported assignee) had a lien on the collaterals when Overbury made

his tender under respondents' demand; not Farley because the attachment in the Kings County action was later held void *ab initio* (*Farley* v. *Overbury*, 252 App. Div. 882); not respondents because the instant the tender was made, their lien as pledgees was discharged (*Lawrence* v. *Maxwell*, 53 N. Y. 19, 23). Overbury was never in default, and respondents had no right to refuse to deliver his collateral and then to sell it.

Question II.

Respondents concede (their brief, p. 6) the correctness of the statements in the second question presented, but say they are not relevant to this case. This contention is negatived by the established rule that "a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract" (*Patterson* v. *Meyerhofer*, 204 N. Y. 96, 100).

The Circuit Court of Appeals (middle p. 119) expressed the view that performance of the contract involved here was prevented not by the act of respondents, but by petitioner's refusal to pay an alleged separate debt to respondents (litigated in Farley's name in the Kings County action). One may not adjudicate a disputed claim in his own favor and then convert the property of his alleged debtor as a penalty for non-payment. The "separate debt" had not been finally established when the present cause of action arose, and has not been finally established now. When respondents served their notice of readiness and demand for performance, they did so with knowledge of the attachment procured by them through their purported assignee, and in effect waived the attachment or represented that it would be removed before the date set for performance. "Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that

he will himself do nothing which may hinder or obstruct that other in doing that thing" (*Patterson* v. *Meyerhofer*, 204 N. Y. 96, 101, *supra*).

As to Question III.

The judgment appealed from was entered on a verdict directed by the court (R. 69, fol. 206). The learned trial judge in his decision (R. 68, fol. 203) said that there was "no evidence upon which to base a finding that defendants acted in bad faith with respect to the attachment or knowingly resorted to an invalid procedure to force plaintiff to default upon his contract to purchase the Aluminum stock." The evidence established beyond question both the facts which the learned judge said had no support in the evidence; and the respondents in fact concede (e.g. brief, pp. 5, 6) that they knowingly prevented petitioner from performing the Aluminum contract (on which he never had defaulted) in order to enable respondents to pay themselves the "independent claim" by appropriating defendant's collateral pledged under the Aluminum contract. In any case, the questions of respondents' good faith and their prevention of performance by petitioner were for the jury. It was pointed out at the trial that while the facts were not in dispute, different inferences could be drawn from them, and that this must be done by the jury (R. 62, fol. 186). This stated correctly the law of New York on the subject. "When from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being, from the existence of another fact, it is for the jury to go through with that process" (*Hart* v. *Hudson River Bridge Co.*, 80 N. Y. 622, 623).

Conclusion.

It is respectfully submitted that the writ should be granted.

Dated: New York, August 1940.

EDWARD V. CONWELL,
Attorney for Petitioner,
Office & P. O. Address,
20 East First Street,
Mount Vernon, New York.

FRANK W. JACKSON,
Of Counsel.